No. 02-946

FILED
JAN 21 2003
OFFICE OF THE CLERK

IN THE

United States Supreme Court

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ and STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK, FRANK MUNOZ, as the State Review Officer of The State Education Department of the State of New York,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSALEE CHARPENTIER
Counsel of Record
MITCHELL SPINAC
FAMILY ADVOCATES, INC.
209 Clinton Avenue
Kingston, New York 12401
845-339-8080

Attorneys for Respondents Steven Schutz and Yvonne Schutz

10 PP

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Introduction.....page 1

Arguments for Denying the Petition.....page 2

I. Questions I and II presented in the Petition are well settled issues in the Court; this Court through two unanimous decisions has resolved both questions.....page 2

II. Questions I and II presented in the Petition are also well-settled statutory mandates as originally written and as amended by Congressional action and intent.....page 9

III. Equity and IDEA intent require maintenance of the disabled child in his or her 'current educational placement' during proceedings brought under the Act.....page 11

Conclusion.....page 11

TABLE OF AUTHORITIES

Burlington School Committee v Massachusetts Dept. of Educ., 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d (1985) 1, 2, 3, 4, 5, 8

Florence County School District Four v Carter, 510 U.S. 7, 114 S.Ct. 361, 136 L.Ed. 284 (1993).....1, 5, 6, 7, 8

Hendrick Hudson Central School District v Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).....7, 8

Honig vDoe, 484 U.S. 305 (1987).....9

Susquenita School District v Raelee S., 96 F3d 78, (3d Cir. 1996) at 83-8.4.....12

INTRODUCTION

The School District's Petition for a writ of certiorari is an untimely and inappropriate attempt to query this Court on the well-settled question as to whether the State education agency has violated the Individuals with Disabilities Education Act, ("IDEA") by requiring the Petitioner to maintain a disabled child in his 'current educational placement' under the IDEA's pendency provision, at 20 U.S.C. Section 1415(j), when that 'current educational placement' is agreed to by the State and the parents but not the local school district. The Petition further adds that non-State approved private schools, agreed upon by both the State and the parents, should somehow be exempt from consideration as the disabled child's 'current educational placement'.

This issue, encompassing both questions 1 and 2 of the Petition, has been well-settled by this Court on two occasions since the enactment of the statute in 1983, Burlington School Committee v. Massachusetts Dept. of Educ., 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed. 2d 285 (1985) and Florence County School District Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). Indeed, there is no lingering federal question as to whether a disabled child is entitled to continue in his/her 'current educational placement' during the pendency of a dispute arising between the parents and the local school district as to the appropriateness of a proposed special education program. The principle that parents receive a full and meaningful opportunity to contest educational plans proposed for their disabled children through administrative and then judicial review is a principle of law as old as the statute itself. The principle that children shall not have their educational placements disrupted until such proceedings are resolved is also as old as the statute itself.

The Petition should be denied as to both Questions 1 and 2 as they seek review of well-settled issues of jurisprudence and Congressional mandate. Respondents Yvonne and Steven Schutz respectfully defer argument on issues raised by Question 3, a sovereign immunity waiver, to the remaining parties.

ARGUMENTS FOR DENYING THE PETITION

I. Questions I and II presented in the Petition are well-settled issues of law in this Court; this Court through two unanimous decisions has resolved both questions.

There are no compelling reasons for this Court to re-open the issues raised by either Question 1 or Question 2 of the Petition and there are neither any conflicts between state courts of last resort nor new federal questions raised in current judicial applications of these issues. Rather, the United States Court of Appeals for the Second Circuit merely imposed compliance with a statutory provision on grounds that have been fully addressed more than once by this Court and also through statutory amendment, by Congress. A disabled child has a right to continue in his or her 'current educational placement' during the course of proceedings that are undertaken to resolve conflicting educational opinions between parents and the local school district—regardless of the formal correctness or 'approval' status of the placement.

A. Burlington School Committee v. Massachusetts Dept. of Educ

First, this Court has reviewed the question of parents' entitlement to reimbursement for unilateral placements. Public funds are clearly available for reimbursement to parents who unilaterally place their disabled children in

proper cases. In its unanimous decision, written by Justice Rehnquist, this Court specifically addressed and settled questions relating to the impact of a parent's unilateral placement on the definition of a disabled child's 'current educational placement', Burlington School Committee v. Massachusetts Department of Education, 105 S. Ct. 1996 (1985). The Burlington decision decided the precise issues presented by Petitioner's Questions I and II herein.

In Burlington, this Court carefully reviewed both the propriety of reimbursement for parental unilateral placements and the effect of final State decisions on the IDEA's pendency provision, at Section 1415 (j), then codified at 1415(e)(3). Burlington held that "the Act authorizes such reimbursement." Justice Rehnquist wrote:

In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

and later:

...we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

In the instant case, the local school district did not bring the question to a court of law but rather conceded defeat under the final decision of the State's highest IDEA administrative review officer. In doing so, the local school

district acknowledged the propriety of the parents' unilateral placement at the private school desired by the parents, the Kildonan School, and indeed the school district reimbursed the parents for tuition expenses under the State's unappealed decision. As a result of that State decision, and in conjunction with voluntary, interim agreements providing for the student's continuation at the parent-preferred placement, the student attended the private school funded by the Petitioner Pawling Central School District for four years *prior to* the initiation of the instant, underlying dispute (regarding 1999-00).

The Burlington decision also held that the State's final administrative decision favoring the parents' unilateral placement constituted a legal 'change in placement' from that offered by the public schools to that desired by the child's objecting parents. In looking at the definition of permissible 'changes in placement' under the IDEA's pendency provision, (now found at 1415(j) but then codified at Section 1415(e)(3)), Justice Rehnquist wrote:

As an initial matter, we note that the section calls for agreement by either the State or the local education agency. The BSEA's [Massachusetts Dept. of Education's Bureau of Special Education Appeals] decision in favor of the P—'s [the parents] and the Carroll School placement [private school chosen by parents] would seem to constitute agreement by the State to the change of placement.

In the instant case, the State's prior unappealed decision in favor of the Schutzes and their private school placement constituted an agreement between the State and parents to a 'change in placement'. If the child's placement has been so changed that placement necessarily becomes the 'current educational placement' at the outset of a

subsequent dispute between the parents and school district. In the instant case, the Burlington principles and findings are entirely consistent with the conclusion arrived at by the Second Circuit, the U.S. district court and the State education agency's highest administrative review officer: this student's 'current educational placement' at the time the instant, underlying proceeding was initiated, was the parents' private school placement.

Thus, the Burlington decision settled the issues for the courts in the instant case and bound them to their ultimate finding that the prior administrative decision awarding these parents reimbursement for the costs of their private school placement constituted a 'change in placement' within the meaning of the Act and for purposes of its 'pendency provision', at Section 1415(j). There is simply no basis for exempting the 'pendency provision' – a critical IDEA procedural safeguard- from the principles of law settled in Burlington.

B. Florence County School District Four v. Carter

Second, Petitioner's question 1 includes reference to the fact that in the instant case, the Respondents' unilateral placement was not a school otherwise 'approved' by the State to provide special education and related services. To the extent that any question remains as to whether Burlington applies to the parents' unilateral placement at Kildonan, an otherwise, unapproved school, a second unanimous decision written by Justice O'Connor, settled this question. In Florence County School District Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), Justice O'Connor wrote an opinion establishing that the legal 'change in placement' that occurs when a parent of a disabled child and the State education agency agree on the propriety of a parental unilateral placement, applies to

unilateral placements that are not otherwise 'approved' by the State as a special education school. Justice O'Connor held that unilateral placements need not meet formal criterion as established for public school placements:

Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

and later:

... public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims. Carter, 510 U.S. at 15-16,114 S.Ct. 361, at 15.

Kildonan's status as an appropriate educational placement for purposes of tuition reimbursement was decided by the State in its prior administrative decision. Its non-State approved status was not a bar to reimbursement there and indeed Petitioner reimbursed the parents for those previous school years and enabled the Schutzes son to attend Kildonan School free of charge for four years prior to the 1999-2000 school year. The Petitioner's question as it relates to Kildonan's non-approved status is well settled. Such placements need not meet the State's standards or be on an 'approved list', but they are rendered 'appropriate under the Act' when determined substantively, by an administrative review officer or court, to be appropriate to the child's needs (*see* Carter at 12-15).

Further, there is no basis to reverse the Carter principle when reviewing a parents' reimbursement claim for violations to the Act's explicit procedural safeguards, found at 20 U.S.C. Section 1415(j). Violation of the Act procedural mandates is to be deemed as serious as denial of access to the Act's substantive requirements, see Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176,102 S. Ct. 3034 (1982). As with the instant case, where a child is denied access to his/her 'current educational placement' during the pendency of the Act's dispute resolution procedures, tuition reimbursement is an appropriate remedy and the non-approval status of the placement is no bar to recovery.

Generally speaking, a non-State approved private school can be defined as a private school that had not first obtain approval from the State Education Department before agreeing to provide educational services to a disabled child. Petitioner refers to the IDEA provision which mandates that all educational programs for children with disabilities meet the educational standards of the respective State educational agencies, see 20 USC 1401(8) and also 1412[a][11][A][II])[1]. The IDEA leaves the business of defining what the specific educational standards are to the individual States.

---

[1] "The term free appropriate public education means special education and related services that -

(B) meet the standards of the State educational agency." 20 U.S.C. 1401(8) and "The State educational agency is responsible for ensuring that - (ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency-(II) meet the educational standards of the State educational agency.

Carter, *Id.* stands for the principle that reimbursement to parents for unilateral placements cannot be denied on the grounds that a private school has not been approved by the State or otherwise able to meet state education standards. In this case, the State has previously held that Kildonan is a private school appropriate for the child and proper under the Act. Specially, in its September 10, 1998 unappealed decision, the State held that Kildonan was appropriate for this child, thus *de facto* meeting State standards. Read together, the Burlington and Carter hold that youngsters in need of special education, who are not offered an appropriate placement by their school district, may be placed unilaterally by their parents.

Carter established that there are two distinct routes to determine whether a placement meets IDEA mandates: the placement can comply with the requirements of §1401(8), (that it meet the standards of the relevant State education agency) by applying to the State before accepting any disabled child. Alternatively, it can be determined substantively to be appropriate to the child's needs pursuant to a fact-finding hearing and written determination by administrative or judicial review. In either case, the unilateral placement meets the standards of the State education agency. Carter placements are IDEA placements and, as such, must intrinsically be placements that a school district can maintain, even granted that it could not originally have recommended those placements.

The pendency provision cannot be wholly ignored solely because a school district cannot recoup funds for the placement from the State. Essentially, appellant argues that the Court suspend the pendency provision where a school district claims fiscal hardship. The IDEA pendency provision is critical aspect of a parent's right to procedural due process under the Act; and as such is part of that

elaborate and highly specific procedural requirement that is "not to be gainsaid", Rowley, *supra*. The school district's hardship in recouping funds from the State Education Department for private school placements not previously on the State's approved list is a separate issue and separate legal question not raised in the Complaint. The State's decision not to assist school district's for such placements cannot abrogate the federal statute's highly specific procedural requirements.

Similarly, the school district's alleged inability to recoup funds from the State cannot abrogate an agreement made between the parents and the State regarding a child's 'current educational placement'. Again, the federal code explicitly permits the parents and the State agency to "otherwise agree" as to the definition of pendency placement, Reg. 300.514(a); there is no provision restricting any placement, including a pendency placement, to those private school that hold prior State approval, or to those placements that otherwise allow for recoupment of funds from the State.

II. Questions I and II presented in the Petition are also well-settled statutory mandates as originally written and as amended by Congressional action and intent.

Questions I and II were raise the question of a disabled child's right to continuity of care during parent-school disputes over programming needs. From the initial promulgation of the statute, it has been the clear purpose of the 'pendency', or 'stay put' provision to provide stability and consistency in the education of a child with a disability, see Honig v. Doe, 484 U.S. 305 [1987]). The language of 1415(j) is unequivocal and admits of no

exceptions, Id. at 323. The purpose of the "stay put" provision is to strip schools of the "unilateral authority they had traditionally employed to exclude disabled students ... from school" and to protect children from any retaliatory action by the agency, also 323.

Congress fully agreed with this Court's emphasis on continuity of a child's education as established in Honig. In 1999, the Code of Federal Regulations was amended to reinforce the importance of maintaining a child's 'pendency' placement during review proceedings. These regulations are clear: once a unilateral placement has been deemed appropriate through administrative proceedings, the child's placement for purposes of a future dispute, is the unilateral placement. The amendment simply clarifies the pre-existing interpretation of the pendency provision and the full cite is:

Sec. 300.514 Child's status during proceedings

(a) Except as provided in Sec. 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under Sec. 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local

agency and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j)).

III. Equity and IDEA intent require maintenance of the disabled child in his or her 'current educational placement' during proceedings brought under the Act.

As stated above, the Act clearly sets forth Congress' intent to insure some modicum of stability in a disabled child's education during that period of time where the question of "appropriate" placement is in dispute and unresolved. Petitioner's Question II defies logic and the clear purposes of the Act's emphasis on parental participation and continuity of a child's education. As the uncontested facts reveal, at the time the instant, underlying dispute arose, in September 1999, this child had attended the Kildonan School since 1995-96. Petitioner proposes that, during the pendency of the current administrative proceedings regarding 1999-2000, the Act should be read to require that this child to be denied access to any 'current educational placement' or be removed to such placement that he had not been in for more than five years. It makes no sense. The placement from 1994-95 can hardly be deemed a 'current educational placement' for any purpose and would serve only to disrupt the child's educational progress.

Equity demands that where the State has once held that the public school failed to provide an appropriate education to a disabled child, and that the parents' unilateral private school placement was able to provide an appropriate education, that child must be maintained in that unilateral placement during any subsequent proceedings that may arise. It would be patently unfair to the disabled child to require him/her to return to a placement already deemed

inappropriate by both the State and, as here, the local education agency, when the parties disagree about a subsequent 'change in placement'.

CONCLUSION

Petitioner's questions 1 and 2 do not reflect important federal questions of law; indeed, these questions have been answered by this Court and by Congress in recent decades. Furthermore, the Circuit Court has in no way abandoned a prior precedent. In fact, there is an abundance of clear and binding decisions that apply and interpret the law to the same facts as presented by Petitioner. These decisions hold, in essence, that once a decision-maker has found an approved private school to be an appropriate placement for a child, that determination, like any other final, unappealed, determination of an appropriate placement, becomes the child's status quo placement for pendency purposes. Furthermore, the range of situations in which this logic has been applied is surprisingly broad.

As stated succinctly in Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, (3d Cir. 1996) at 83-84 (footnote omitted):

While parents who reject a proposed IEP bear the initial expenses of a unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position. The purpose of the Act, which is to ensure that every child receive a "free and appropriate education" is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for continued private education.

WHEREFORE, Respondents Yvonne and Steven Schutz, respectfully request this Court decline acceptance of this case for review of questions I and II of the Petition.

January 21, 2003

Respectfully submitted by,

RosaLee Charpentier
Mitchell Spinac
Attorneys for Respondents
Yvonne and Steven Schutz
Family Advocates, Inc.
209 Clinton Avenue
Kingston, New York 12401
(845) 339-8080